Cite as, Ga., 295 S.E.2d 281

HORTON

v.

The STATE.

No. 38570.

Supreme Court of Georgia.

Sept. 8, 1982.

Rehearing Denied Sept. 28, 1982.

Defendant was convicted in the Superior Court, Bibb County, C. Cloud Morgan, J., of murder and two counts of burglary, and he was sentenced to death for the murder and to 20 years for each of the burglaries, and he appealed. The Supreme Court, Jordan, C. J., held that: (1) evidence was sufficient to support conviction; (2) being discovered during commission of burglary was not such provocation as would require charge on voluntary manslaughter; (3) there were no circumstances of alleviation or mitigation in State's evidence, as would make it error to charge that malice is presumed from use of deadly weapon; (4) trial court did not err in overruling defendant's motion for change of venue; (5) trial court did not err in refusing to allow argument concerning parole; (6) trial court did not err in refusing to allow defendant to describe to jury during his closing argument the mechanics of electrocution; (7) victim's status as district attorney was not considered by jury in deciding to impose death penalty for murder; (8) prosecutor's remarks, during sentencing phase, made no reference to parole and his argument concerning deterrence was not prejudicial; (9) instructions given sufficiently defined mitigating circumstances and informed jury as to function of mitigating circumstances in sentencing deliberations; (10) trial court did not abuse its discretion in denying extraordinary motion for new trial on basis of newly discovered evidence of accomplice's confession; (11) sentence of death for murder was not imposed under influence of passion, prejudice, or other arbitrary factor; (12) evidence supported jury's finding of statutory aggravating circumstance; (13) death penalty was not excessive per se for murder committed during burglary; and (14) sentence was not disproportionate or excessive.

Affirmed.

1. **Burglary** ⇐41(1)
Homicide ⇐250

Evidence was sufficient to support conviction of murder and two counts of burglary.

2. **Homicide** ⇐309(4)

Written request to charge voluntary manslaughter must be given if there is slight evidence to support it.

3. **Homicide** ⇐309(6)

Being discovered during commission of burglary was not such provocation as would require charge on voluntary manslaughter. Code, § 26-1102.

4. **Homicide** ⇐286(2)

There were no circumstances of alleviation or mitigation in State's evidence, as would make it error to charge that malice is presumed from use of deadly weapon, and moreover, trial court did not charge that malice could be presumed from use of deadly weapon.

5. **Criminal Law** ⇐126(2)

In prosecution which resulted in conviction of murder and two counts of burglary, trial court did not err in overruling defendant's motion for change of venue, where only two jurors were excused because they had formed opinions as to guilt or innocence from pretrial publicity.

6. **Constitutional Law** ⇐270(2)
Criminal Law ⇐1213

Eighth and Fourteenth Amendments require that sentencer not be precluded from considering, as mitigating factor, any aspect of defendant's character or record and any circumstance of offense that defendant proffers as basis for sentence less than death; however, that does not limit traditional authority of court to exclude, as irrelevant, evidence not bearing on defend-

ant's character, prior record or circumstances of his offense. U.S.C.A.Const.Amends. 8, 14.

7. Criminal Law ⇐723(1)

State is forbidden to comment with regard to defendant's inability to make parole, as well as his ability to do so. Code, § 27-2206.

8. Criminal Law ⇐723(1)

Since ability or inability to obtain early release did not relate to defendant's character, his prior record, or circumstances of his offense, trial court did not err in refusing to allow requested argument. Code, §§ 27-2206, 27-2511; U.S.C.A.Const.Amends. 8, 14.

9. Criminal Law ⇐723(1)

In prosecution which resulted in death sentence, trial court did not err in refusing to allow defendant to describe to jury during his closing argument the mechanics of electrocution. Code, § 81-1009.

10. Criminal Law ⇐1208(1)

As to cases in which capital punishment is possible, jury is allowed to give case individualized consideration of circumstances of crime and of defendant. Code, § 27-2534.1(b), (b)(1-10), (c).

11. Criminal Law ⇐1208(1)

Jury's recommendation of death penalty could not properly be based on constitutionally impermissible reasons such as race or religious preference.

12. Homicide ⇐354

Victim's status as district attorney was not considered by jury in deciding to impose death penalty for murder. Code, § 27-2534.1(b)(5).

13. Criminal Law ⇐1171.1(6)

Prosecutor's remarks, during sentencing phase, made no reference to parole and his argument concerning deterrence, which defendant contended injected facts into case not in evidence and led jury to believe sentence of death would not be carried out, was not prejudicial.

14. Criminal Law ⇐796

Death penalty statute does not require that specific mitigating circumstances be singled out by court in its charge to jury.

15. Criminal Law ⇐796

In capital case, instructions given sufficiently defined mitigating circumstances and informed jury as to function of mitigating circumstances in sentencing deliberations.

16. Criminal Law ⇐951(5)

Trial court did not abuse its discretion in denying extraordinary motion for new trial on basis of newly discovered evidence of accomplice's confession, since evidence supported trial court's finding that defendant, but not his attorneys, knew of "confession," if there was one, and failed to notify his attorneys even though he had ample opportunity to do so; moreover, circumstances surrounding allegedly newly discovered evidence, as well as certain testimony, cast serious doubt on credibility of proposed testimony.

17. Homicide ⇐354

Sentence of death for murder was not imposed under influence of passion, prejudice, or other arbitrary factor.

18. Homicide ⇐354

Evidence that defendant was discovered while still at scene of burglary and fired at two people in his attempt to get away, killing one, supported jury's finding of statutory aggravating circumstance that offense of murder was committed while defendant was engaged in commission of burglary. Code, § 27-2534.1(b)(2).

19. Homicide ⇐354

Death penalty was not excessive per se for murder committed during burglary. Code, § 27-2534.1(b)(2).

20. Criminal Law ⇐1206(2)

Death sentence was not disproportionate to sentence imposed on codefendant, who was sentenced to life imprisonment, where evidence showed that defendant, and not his codefendant, planned burglaries and actually killed victim, defendant was con-

victed of malice murder whereas codefendant was convicted for felony-murder and defendant's prior record was much worse than codefendant's.

21. Criminal Law ⇐1208(1)

Sentence of death will not be affirmed unless in similar cases throughout state death penalty has been imposed generally and not wantonly and freakishly; however, Supreme Court does not include for comparison purposes any case as to which death penalty was not available option.

22. Criminal Law ⇐1206(2)

Death sentence was not excessive or disproportionate to sentences generally imposed in cases in which murder occurred during commission of burglary.

Hugh Q. Wallace, John E. Simmons, Macon, for Jimmy Lee Horton.

Joseph H. Briley, Dist. Atty., Gray, Tom Matthews, Asst. Dist. Atty., Macon, Michael J. Bowers, Atty. Gen., for the State.

JORDAN, Chief Justice.

Appellant, Jimmy Lee Horton, was convicted of murder and two counts of burglary. He was sentenced to death for the murder and to twenty years for each of the burglaries. He now appeals, raising 16 enumerations of error. We affirm.

The facts can be summarized as follows: Around 6:00 p. m. of the evening of November 28, 1980, appellant borrowed a pickup truck from a friend on the pretext of needing to move furniture. Later that evening, appellant and Fless "Chug" Brown burglarized the home of Willie James Griffin. The two took a dark-colored H & R .22 caliber pistol, some bullets, a television and a wedding band. Next, appellant and Brown forced their way into the apartment of Sherrell Grant.

Shortly after 11:00 p. m., Sherrell Grant and Don Thompson returned to her apartment. The front door was not fully closed. Ms. Grant pushed the door open and saw that several items of her furniture were missing. They listened and, hearing no noise, decided the burglars had left. As a precaution, however, they went to the apartment next door to borrow a gun, and then, while Ms. Grant waited outside, Thompson entered her apartment.

Ms. Grant noticed that a pickup was backed into a parking place at the end of the parking lot. A black male came around the corner of the apartments and went to the pickup. He was soon followed by a taller black male who, in Ms. Grant's words, "... hesitated, like he might have—was going to go back around, but he went on like he was going to walk to the truck. I told him to stop and not to go anywhere. And when I did that, he started shooting at me." Her neighbor pulled Ms. Grant into his apartment and locked the door. They heard a second volley of shots. The neighbor called the police and Ms. Grant exited the apartment to look for Thompson. The pickup was gone. Thompson was found slumped over behind the apartment building. The gun he had borrowed had not been fired; the safety was on.

Appellant, who was taller than Brown, returned the pickup to its owner to whom he admitted that he had shot a man. The pistol stolen in the first burglary was recovered from appellant's residence. This was later identified as the murder weapon. The screwdriver used to force open the door to Ms. Grant's apartment was found in appellant's car.

[1] The evidence, viewed in a light most favorable to the prosecution, was clearly sufficient to support the jury's finding of guilt as to the murder and the two burglaries. *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

GUILT-INNOCENCE PHASE

In his eighth enumeration of error, appellant contends the court erred in failing to charge voluntary manslaughter upon timely request.

[2] A written request to charge voluntary manslaughter must be given if there is slight evidence to support it. *State v. Clay*,

249 Ga. 250(1), 290 S.E.2d 84 (1982). See also, *Washington v. State*, 249 Ga. 728, 292 S.E.2d 836 (1982), and *Johnson v. State*, 249 Ga. 621, 292 S.E.2d 696 (1982).

[3] In this case, we are unable to find even slight evidence that appellant acted "as the result of a sudden, violent and irresistible passion resulting from serious provocation sufficient to excite such passion in a reasonable person . . ." Code Ann. § 26-1102. Compare, *Krier v. State*, 249 Ga. 80, 94, 287 S.E.2d 531 (1982). Being discovered during the commission of a burglary is not as a matter of law such provocation as would require a charge on voluntary manslaughter.

2. In his ninth enumeration of error, appellant complains of the following charge: " . . . [I]f a person of sound mind and discretion intentionally and without justification uses a deadly weapon or instrumentality in the manner in which such weapon or instrumentality is ordinarily used and thereby causes the death of a human being, you may infer the intent to kill."

[4] Appellant contends this charge violates the rule that if the state's evidence shows mitigating circumstances, it is error to charge that malice is presumed from the use of a deadly weapon. See, e.g., *Jordan v. State*, 232 Ga. 749(5), 208 S.E.2d 840 (1974). We find no circumstances of alleviation or mitigation in the evidence presented by the state; moreover, it is clear that the trial court did not charge that malice may be presumed from the use of a deadly weapon. This enumeration of error is meritless.

[5] 3. The trial court did not err in overruling appellant's motion for change of venue. Only two jurors were excused because they had formed fixed opinions as to guilt or innocence from pre-trial publicity. Compare, *Waters v. State*, 248 Ga. 355(1), 283 S.E.2d 238 (1981).

SENTENCING PHASE

4. In his fourth enumeration of error, appellant contends the trial court erred in refusing to permit him to argue to the jury during the sentencing phase of his trial that since he was a habitual violator, he would have to serve 20 years without parole. See Code Ann. § 27-2511. Appellant argues that he was deprived of his right to present this mitigating circumstance to the jury.

[6] The "Eighth and Fourteenth Amendments require that the sentencer . . . not be precluded from considering, as a *mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Lockett v. Ohio*, 438 U.S. 586, 604, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1981) (footnotes omitted). However, nothing in *Lockett v. Ohio* "limits the traditional authority of a court to exclude, as irrelevant, evidence not bearing on the defendant's character, prior record, or the circumstances of his offense." Ibid, fn. 12.

[7] The policy of this state is not to allow argument or charge on matters concerning parole. *McKuhen v. State*, 216 Ga. 172(5), 115 S.E.2d 330 (1960); Code Ann. § 27-2306. This policy forbids comment with regard to a defendant's *inability* to make parole, as well as his *ability* to do so. *Golden v. State*, 213 Ga. 481(3), 99 S.E.2d 882 (1957).

[8] The ability or inability to obtain early release does not relate to a defendant's character, his prior record, or the circumstances of his offense. Thus our state policy forbidding argument about such matters does not run afoul of either the Eighth or Fourteenth Amendments to the U. S. Constitution and the trial court did not err in refusing to allow the argument.

5. In his fifth enumeration of error, appellant contends the trial court erred in refusing to allow him to describe to the jury during his closing argument the mechanics of an electrocution.

[9] In *Franklin v. State*, 245 Ga. 141(7), 263 S.E.2d 666 (1980) we held that testimony regarding descriptions of executions, offered during the sentencing phase of a trial, may be excluded as irrelevant upon objec-

tion by the state. No such evidence was offered in this case and the trial court did not err in refusing to allow appellant to argue facts not in evidence. Code Ann. § 81-1009.

6. In his sixth enumeration of error, appellant contends the trial court erred in denying his written request to charge: "The fact that the victim was the District Attorney of this circuit is not to be considered by you as being in aggravation of punishment. This should play no part in your thought processes in determining the question of punishment." Appellant contends the charge was a correct statement of the law, was pertinent and material to the issues, and was not substantially covered in the charge given; therefore the failure to charge his written request was reversible error. *See Roy v. Gallant-Belk Co.*, 147 Ga.App. 580(4), 249 S.E.2d 635 (1978). We disagree.

Under our capital punishment law, injuries may not recommend the death sentence unless they find the presence of at least one of the aggravating circumstances specifically enumerated in Code Ann. § 27-2534.1(b)(1-10).[1] Code Ann. § 27-2534.1(c). In deciding whether or not to recommend the death penalty, however, the jury may consider not only the "statutory aggravating circumstances" set forth in Code Ann. § 2534.1(b)(1-10) but also any "mitigating circumstances or aggravating circumstances authorized by law." Code Ann. § 27-2534.1(b). See also *Lockett v. Ohio*, supra.

[10] Thus, capital punishment is possible only in a small number of explicitly defined subclasses of homicide cases; but as to such cases, the jury is allowed to give the case before it individualized consideration of the circumstances of the crime and of the defendant.[2] Compare *Roberts v. Louisiana*, 428 U.S. 325, 96 S.Ct. 3001, 49 L.Ed.2d 974, and *Woodson v. North Carolina*, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944.

[11, 12] There is no doubt that a jury's recommendation of the death penalty could not properly be based on constitutionally impermissible reasons, such as race or religious preference. However, whether or not the victim's status as the District Attorney properly could have been considered in aggravation,[3] it is clear that it was not.

The victim's occupation was made the subject of extensive voir dire by appellant who asked for and received assurances that the victim's job would not be considered as an aggravating circumstance. In his closing argument, appellant argued, "I go back to the fact that Don Thompson was the District Attorney. On my own, I asked everybody would that influence his verdict, and you told me no . . . I know that's not going to enter into your verdict . . ." The prosecutor also argued that the death penalty wasn't being sought because the victim was a District Attorney. Moreover, there is no indication from the evidence presented that appellant knew at the time of the murder that his victim was the District Attorney.

7. Appellant's seventh, twelfth, and thirteenth enumerations of error relate to allegedly improper argument by the prosecutor.

During the sentencing phase, evidence was offered of appellant's prior record. In December of 1970 appellant committed two burglaries. In early 1971, he stole one motor vehicle and attempted to steal another. In May 1971, appellant pled guilty to the burglaries and received six years for each, to run concurrently. In October 1971, he pled guilty to the motor vehicle thefts and

1. Except for the offenses of aircraft hijacking or treason, which do not require a finding of statutory aggravating circumstances. Code Ann. § 27-2534.1(a).

2. The jury's discretion to impose capital punishment is further limited by our review of the death penalty wherein we determine, among other things, whether the death penalty is excessive or disproportionate to the penalty imposed in similar cases. Code Ann. § 27-2537(c)(3).

3. Code Ann. § 27-2534.1(b)(5) (The murder of a district attorney during or because of the exercise of his official duty) was not charged to the jury.

received a sentence of three years,[4] to run concurrently with the burglary sentences.

In December 1975 and again in February 1976, appellant committed two more burglaries. He pled guilty to these in April 1976. He escaped from the penitentiary in August of 1976 and before his recapture, committed the offenses of theft by receiving and armed robbery. In June 1977, he pled guilty to the theft and armed robbery charges.[5] In August 1977, he pled guilty to the escape. All the sentences, except for the escape, ran concurrently with each other.[6] No sentence required appellant to serve more than six years (he was given a one year sentence for the escape).

During his argument, the prosecutor pointed out that, because of the concurrent sentencing, appellant had actually been sentenced to serve only six years for his first four offenses. He noted the comparatively light sentences received for the other crimes and argued that the "system" had been good to appellant and had given him every chance to straighten out his life. He argued that the penitentiary was not punishment for appellant, that appellant was "willing to plead guilty to anything that doesn't do anymore than send him back to the penitentiary." He argued that the death penalty was obviously a deterrent, that "[t]hose who would say the death penalty is no deterrent rely on negative statistics. They will tell you that statistics [do] not prove that the death penalty is a deterrent. Well, of course, statistics can't prove that . . . The reason our death penalty now hasn't reduced killings any is because we are not using it, not carrying out sentences. That's the reason it's not deterring it now."

[13] Appellant contends that the prosecutor made an argument concerning parole, in violation of Code Ann. § 27-2306. We find no such violation. The prosecutor's remarks made no reference to parole. The thrust of his argument was that since the sentences imposed were run concurrently, appellant had got a break he didn't deserve and that he had had his chance to be rehabilitated, but had failed to respond because he was beyond rehabilitation and did not deserve another chance. *See, Redd v. State*, 242 Ga. 876(4), 252 S.E.2d 383 (1979).

Appellant also contends that the prosecutor's argument concerning deterrence injected facts into the case not in evidence and contaminated the jury with the "Private Slovik Syndrome" by leading the jury to believe a sentence of death would not be carried out.

"Were this not a death penalty case, these [latter two] enumerations of error would present nothing for review since no objection to these remarks was made. [cits.] Because this is a death penalty case, and the allegedly improper argument occurred in the sentencing phase of the trial, we have reviewed these remarks and determined that they were not so inflammatory and prejudicial as to mandate setting aside the death penalty on the basis that it was imposed under the influence of passion, prejudice, or any other arbitrary factor. [cits]." *Gilreath v. State*, 247 Ga. 814(15), 279 S.E.2d 650 (1981).

While the prosecutor should not have referred to facts not in evidence, the fact that the death penalty has seldom actually been carried out in recent years is surely a matter of common knowledge. We do not believe that the jury was led to believe that if they recommended the death penalty, it would never be carried out. In fact, the clear implication of the argument was that it eventually would be. See also *Borden v. State*, 247 Ga. 477(4), 277 S.E.2d 9 (1981).

8. In his eleventh enumeration of error, appellant contends the court's charge on mitigating circumstances was error, citing *Spivey v. Zant*, 661 F.2d 464 (5th Cir. 1981). We find no error.

4. Apparently only one three year sentence was imposed even though two charges were listed on the sentence form.

5. Additional charges of burglary and motor vehicle theft were nolle prossed, possibly in exchange for a guilty plea to the armed robbery count.

6. Either by express direction, or by operation of law. See Code Ann. § 27-2510.

The trial court defined mitigating circumstances for the jury as follows: "Mitigating circumstances are those which do not constitute a justification or excuse for the offense in question but which in fairness and mercy may be considered as extenuating or reducing the degree of moral culpability or blame."

The trial court instructed the jury to consider evidence as to mitigating circumstances, and made it clear to the jury that it could recommend a life sentence even if it found that the state had proven the existence of one or more aggravating circumstances beyond a reasonable doubt.

[14, 15] The Georgia death penalty statute does not require that specific mitigating circumstances be singled out by the court in its charge to the jury. *Gates v. State*, 244 Ga. 587(6), 261 S.E.2d 349 (1979). See also, *Lockett v. Ohio*, supra. The instructions given sufficiently defined mitigating circumstances and informed the jury as to the function of mitigating circumstances in the sentencing deliberations.

EXTRAORDINARY MOTION FOR NEW TRIAL.

9. Appellant was sentenced to death February 27, 1981. He filed a motion for new trial, which was denied August 17, 1981. He then appealed to this court. However, on October 2, 1981, appellant filed in the trial court an "Unusual and Extraordinary Motion for New Trial as to Sentencing on the Basis of Newly Discovered Evidence." This court ordered that the appeal be held in abeyance pending a hearing and determination by the trial court on the extraordinary motion. On March 8, 1982, the trial court, after hearing, denied the motion. In his fifteenth enumeration of error, appellant contends the denial of his extraordinary motion for new trial as to sentencing was error.

Appellant testified at the hearing on the motion that in the latter part of July, 1981, he heard for the first time that Pless Brown might have admitted to Arthur Fryer that he, Brown, had killed Don Thompson. It is not disputed, and the trial court found as a matter of fact, that appellant's attorneys had no knowledge of Brown's alleged confession until contacted by appellant in late September, 1981.

Fryer was called and testified that Brown had admitted being the triggerman. However, Fryer also testified that he had met appellant in a cemetery three to four days after Thompson's death and had informed appellant of Brown's admission. Moreover, Fryer admitted that he had been a fugitive from justice from the time of the shooting until September, 1981, when he was caught and placed in the Bibb County jail where appellant was being held pending his appeal. He further admitted that he had known appellant for some 12 to 15 years and that he and appellant had committed a burglary together in 1976, for which they both served time. Finally, he admitted that he had refused to sign his affidavit, which was attached to appellant's extraordinary motion for new trial, until he was told by appellant's attorneys that Brown, whom Fryer also knew well, had already been sentenced to life imprisonment and was "home free."

Fryer's testimony was contradicted by Hamp Davis, who testified that Fryer had told him that the day after Thompson was killed, appellant had admitted shooting a man but didn't know who he was.

[16] The six requirements for granting a new trial on the basis of newly discovered evidence are well established and need not be repeated in full here. See *Drake v. State*, 248 Ga. 891, 894, 287 S.E.2d 180 (1982); and *Dick v. State*, 248 Ga. 898, 900, 287 S.E.2d 11 (1982). The trial court found that appellant failed to establish that the evidence had come to his knowledge since the trial, and found that it was owing to the appellant's want of due diligence that his attorneys did not acquire the evidence sooner.

The evidence supports the court's finding that appellant, but not his attorneys, knew of the "confession," if there was one, and failed to notify his attorneys even though he had ample opportunity to do so. Appel-

lant's testimony that he only learned of Brown's confession long after the trial was over was contradicted by the very witness by whom he sought to establish that such a confession was made.

Moreover, the circumstances surrounding the alleged newly discovered evidence, as well as the testimony of Hamp Davis, "cast serious doubt on the credibility" of Fryer. *Drake v. State*, supra. We conclude that the trial court did not abuse its discretion in denying appellant's extraordinary motion for new trial as to sentencing.

SENTENCE REVIEW

[17] 10. We conclude from our review of the record in this case that the sentence of death was not imposed under the influence of passion, prejudice, or other arbitrary factor. Appellant's fourteenth enumeration of error is without merit.

11. The jury found as a statutory aggravating circumstance that "the offense of murder was committed while the offender was engaged in the commission of burglary . . ." See Code Ann. § 27-2534.1(b)(2). Appellant contends in his third enumeration of error that this finding was not supported by the evidence, because appellant had withdrawn from the burglary and was attempting to flee when the murder took place.

There is no merit to this contention. In a case involving a felony murder, we held: "A homicide is within the res gestae of the underlying felony for the purpose of the felony-murder rule if it is committed while fleeing the scene of the crime. [cit.] The weight of authority holds that the underlying felony continues during the escape phase of the felony if there is continuous pursuit immediately organized, and the felony terminates at the point the perpetrator has arrived at a place of seeming security or when the perpetrator is no longer pursued by the authorities. [cits.]" *Collier v. State*, 244 Ga. 553, 560(3), 261 S.E.2d 364 (1979).

[18] Appellant was discovered while still at the scene of the burglary. He fired at two people in his attempt to get away, killing one. We readily conclude that the murder occurred during the commission of the burglary and that the evidence supports the jury's finding of statutory aggravating circumstance (b)(2) beyond a reasonable doubt. Code Ann. § 27-2534.1(c).

12. In his sixteenth enumeration of error, appellant contends that the imposition of the death penalty for a murder occurring during the commission of a burglary is per se excessive because such a murder does not reflect a consciousness materially more depraved than that of any person guilty of murder.

In *Godfrey v. Georgia*, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1979), the United States Supreme Court set aside Godfrey's death sentences, which had been imposed on the basis that the murders were outrageously or wantonly vile, horrible or inhuman in that they involved torture, depravity of mind, or aggravated batteries to his victims. Code Ann. § 27-2534.1(b)(7). The jury's verdict failed to note that torture, depravity of mind or aggravated battery had been found. The Court concluded that none could have been found because it had been conceded by the prosecutor that neither torture nor aggravated battery had been involved and Godfrey's "crimes cannot be said to have reflected a consciousness materially more 'depraved' than that of any person guilty of murder." Id. at 455, 100 S.Ct. at 1778-79. Thus, the evidence failed to support a finding of the (b)(7) aggravating circumstance.

Nothing in Godfrey or in our death penalty statute requires that a death penalty be set aside in every case unless the defendant can be characterized as "depraved." The aggravating circumstance (b)(2) found in appellant's case does not require a finding of depravity of mind.

[19] Appellant has given us no reason to hold that the death penalty is excessive per se for a murder committed during a burglary. Compare, *Coker v. Georgia*, 433 U.S. 584, 97 S.Ct. 2861, 53 L.Ed.2d 982 (1977). This enumeration of error is meritless.

13. In his second enumeration of error, appellant contends his death sentence is disproportionate to the sentence imposed in a similar case, that of his co-defendant, who was sentenced to life imprisonment. Appellant argues that no distinction exists which would justify different sentences in the two cases.

We note that appellant, not Brown, fired at Sherrell Grant with a dark-colored pistol similar to the one later found in appellant's apartment which was shown to be the murder weapon.[7] Appellant borrowed the truck used in the two burglaries, owned the screwdriver which was used to pry open the door in the second burglary and sold the television taken in the first burglary. Appellant admitted to Hamp Davis (and possibly to Arthur Fryer) that he was the triggerman.

[20] The evidence shows that appellant, and not Brown, was the one who planned the burglaries and who actually killed Don Thompson. It is not insignificant that appellant was convicted of *malice* murder whereas Brown's conviction was for *felony* murder (which does not require a finding of a specific intent to kill—Code Ann. § 26-1101(b)).

Moreover, appellant's prior record, see division 7 of this opinion, is much worse than Brown's. Thus, considering both the crime and the defendant, it is obvious that there are significant differences between Brown and his crime and appellant and his crime.[8]

14. In his first enumeration of error, appellant contends his death sentence is excessive and disproportionate to the sentences generally imposed in cases similar to his. Appellant refers us to a number of cases in which a murder occurred during the commission of a burglary but the defendant was sentenced to life.

[21] We will not affirm a sentence of death unless in similar cases throughout the state the death penalty has been imposed generally and not "wantonly and freakishly." *Moore v. State*, 233 Ga. 861, 864, 213 S.E.2d 829 (1975). However, since the emphasis is on what sentence triers of fact are willing to impose, we do not include for comparison purposes any case as to which the death penalty was not an available option because the case post-dated *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), and pre-dated the enactment of our 1973 death penalty law.[9] Thus, we do not consider *Allen v. State*, 231 Ga. 17, 200 S.E.2d 106 (1973), one of the allegedly similar cases cited by appellant.

[22] We have reviewed all the other cases cited by appellant and all other cases appealed to this court since January 1, 1970, in which the murder occurred during the commission of a burglary. We find the following life cases to be dissimilar to appellant's case because the defendants were juveniles: *Miller v. State*, 240 Ga. 110, 239 S.E.2d 524 (1977) (16 year old defendant); *Brooks v. State*, 238 Ga. 529, 233 S.E.2d 783 (1977) (16 year old defendant); *Williams v. State*, 238 Ga. 296, 232 S.E.2d 535 (1977) (14 year old defendant); *McClendon v. State*, 237 Ga. 855, 229 S.E.2d 427 (1976) (14 year old defendant). We find other life cases cited by appellant to be dissimilar because the defendants were not the actual killers: *Smith v. State*, 245 Ga. 206, 264 S.E.2d 15 (1980); *Lane v. State*, 238 Ga. 407, 233 S.E.2d 373 (1977); *Dutton v. State*, 228 Ga. 850, 188 S.E.2d 794 (1972).

We note that appellant, after being discovered during the burglary, made no attempt to escape peacefully or to surrender, but fired first at an unarmed woman and

7. The only other pistol involved was a silver-colored one taken from Ms. Grant's apartment. She was positive that the gun appellant fired at her was not hers.

8. Even if there were none, an isolated decision of a jury to recommend mercy in a similar case would not necessarily require this court to find a sentence of death excessive or disproportionate. *Moore v. State*, 233 Ga. 861, 213 S.E.2d 829 (1975). See, however, *Ward v. State*, 239 Ga. 205(5), 236 S.E.2d 365 (1977).

9. We do compare cases as to which the death penalty could have been sought by the prosecutor but was not. Cf. *Enmund v. Florida*, ——— U.S. ———, ——— – ———, 102 S.Ct. 3368, 3375–76, 73 L.Ed.2d 1140 (1982).

thereafter at a man who, although armed, did not fire a shot.[10]

Moreover, a defendant's prospects for rehabilitation and the risk he presents to society are surely factors any sentencing authority would be entitled to consider in imposing sentence. Appellant had nine prior felony convictions, including four burglaries, an armed robbery, and an escape. By the time of sentencing, he had amassed three additional felony convictions, two for burglary and one for murder.[11]

We conclude that appellant's sentence is not excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. The similar cases listed in the appendix support the affirmance of the death penalty.

15. This case was tried under the Unified Appeal procedure. We have reviewed the record and find no addressable error not enumerated by appellant.

Judgment affirmed.

All the Justices concur.

APPENDIX.

Bowden v. State, 239 Ga. 821, 238 S.E.2d 905 (1977); *Stephens v. State*, 237 Ga. 289, 227 S.E.2d 261 (1976); *Moore v. State*, 232 Ga. 861, 213 S.E.2d 829 (1975); *Callahan v. State*, 229 Ga. 737, 194 S.E.2d 471 (1971); *Pass v. State*, 227 Ga. 730, 182 S.E.2d 779 (1971).

10. By contrast, in *Burke v. State*, 248 Ga. 124, 281 S.E.2d 607 (1981), the victim had fired several shots at Burke before Burke returned fire.

11. Thus, *Ross v. State*, 245 Ga. 173, 263 S.E.2d 913 (1980), is distinguishable because Ross, although not a juvenile, was only 18 years old. We also note that Ross presented an alibi that was supported by testimony from his mother, brother, and sister.

INDICTMENT

STATE OF GEORGIA, BIBB COUNTY,

The Grand Jurors selected, chosen and sworn for the County of BIBB, to-wit:

1. PATRICIA BARFIELD, Foreman.
2. PAUL M. HAYES
3. ~~DELORIS I. ADKINS~~
4. ~~EDWARD PAUL HARPER~~
5. MIRIAM A. HEATH
6. ~~JACK N. HORTON~~
7. ROBERT J. HILL
8. DONNA HARDEMAN
9. CARL E. HESTER
10. DIANE W. LANGFORD
11. BEATRICE P. LOWE
12. RAY PEAVY
13. ANNIE MAUDE PETERSON
14. MAGGIE C. POLIVICK
15. ALLEN ROUNTREE
16. DALE ROSS
17. CLARENCE SALLEE
18. CARL T. SIKES
19. ROBERT L. SIMS
20. LARRY E. SMITH
21. ~~JOHN H. WESTMORELAND~~
22. KEITH STRINGFELLOW
23. JOANN WRIGHT

in the name and behalf of the citizens of Georgia, charge and accuse Jimmy Horton hereinafter referred to as the accused, of the State and County aforesaid, with the offense of MURDER

For that the said accused, on the 28th day of November in the Year Nineteen Hundred and Eighty, in the State and County aforesaid, did then and there unlawfully and with force and arms, feloniously and with malice aforethought, with a pistol which he had and held, the same being a weapon likely to produce death, make an assault upon Willard Don Thompson, and the said accused, with said weapon, did then and there unlawfully, feloniously and with malice aforethought shoot the said Willard Don Thompson, thereby giving to him mortal wounds, of which wounds the said Willard Don Thompson then and there died.

contrary to the laws of said State, the good order, peace and dignity thereof.

COUNT #2: And the Grand Jurors aforesaid, upon their oaths aforesaid, in the name and behalf of the citizens of Georgia further charge and accuse Jimmy Horton with having committed the offense of BURGLARY; For that the said accused on the 28th day of November in the year Nineteen Hundred and Eighty, in the State and County aforesaid, did then and there unlawfully and without authority enter into the dwelling house

of Sherrell Grant, 1737 Graham Road, Raintree Apartment A-6, Bibb County, Georgia, with intent to commit a theft therein, contrary to the laws of said State, the good order, peace and dignity thereof.

COUNT #3: And the Grand Jurors aforesaid, upon their oaths aforesaid, in the name and behalf of the citizens of Georgia further charge and accuse Jimmy Horton with having committed the offense of BURGLARY; For that the said accused on the 28th day of November in the year Nineteen Hundred and Eighty, in the State and County aforesaid, did then and there unlawfully and without authority enter into the dwelling house of Willie James Griffin, 4334 Summer Hill Drive, Bibb County, Georgia, with intent to commit a theft therein,

contrary to the laws of said State, the good order, peace and dignity thereof.

BIBB Superior Court, December term, 19 80 .

Joseph H. Briley
District Attorney Pro tempore
C. W. Bishop (Special Presentment as to
Prosecutor Counts Two and Three)

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AND FURTHER the said Jimmy Horton was heretofore on October 15, 1971 convicted of the offenses of Theft of a Motor Vehicle and Criminal Attempt to Commit Theft of a Motor Vehicle, in the Superior Court of Bibb County, Georgia, under Case No. 13475, and was sentenced to the penitentiary.

AND FURTHER the said Jimmy Horton was heretofore on May 4, 1971 convicted of the offense of Burglary (2 Counts), in the Superior Court of Bibb County, Georgia, under Case No. 13270, and was sentenced to the penitentiary.

AND FURTHER the said Jimmy Horton was heretofore on April 13, 1976 convicted of the offense of Burglary, in the Superior Court of Bibb County, Georgia, under Case No. 17216, and was sentenced to the penitentiary.

AND FURTHER the said Jimmy Horton was heretofore on April 13, 1976 convicted of the offense of Burglary, in the Superior Court of Bibb County, Georgia, under Case No. 17358, and was sentenced to the penitentiary.

AND FURTHER the said Jimmy Horton was heretofore on June 28, 1977 convicted of the offense of Armed Robbery, in the Superior Court of Bibb County, Georgia, under Case No. 18501, and was sentenced to the penitentiary.

AND FURTHER the said Jimmy Horton was heretofore on June 28, 1977 convicted of the offense of Theft by Receiving Stolen Property, in the Superior Court of Bibb County, Georgia, under Case No. 18626, and was sentenced to the penitentiary.

All of the above prior convictions are incorporated by reference into Counts Two and Three of this indictment.

Jan 8 1981

Patricia S Barfield

Foreman Grand Jury Bibb

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The Defendant Jimmy Horton being formally arraigned, pleads Not guilty, this 9th day of February, 19 81

Defendant's Attorney

District Attorney Pro tempore

Jimmy Horton
Defendant

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AS TO COUNT 1, WE THE JURY FIND THE DEFENDANT GUILTY OF MURDER

AS TO COUNT 2, WE THE JURY FIND THE DEFENDANT GUILTY AS CHARGED.

AS TO COUNT 3, WE THE JURY FIND THE DEFENDANT GUILTY AS CHARGED.

C. R. Cronin Foreman
C. R. CRONIN
2-27-81

FILED IN OFFICE
2nd day of March 1981
Deputy Clerk

3112

No. 21619 D-2

BIBB SUPERIOR COURT

December Term, 19 80

THE STATE

vs.

Jimmy Horton

MURDER; BURGLARY (2 COUNTS)

True Bill, This 8 Day of January, 19 81

Foreman

C. W. Bishop
(Special Presentment Prosecutor as to Counts Two and Three)

JOSEPH H. BRILEY
District Attorney Pro tempore

WITNESSES

Comm. Bishop
Wayne Arrington
Terry Singleton
Sherrell Grant

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No. 198
DESTRUCTION

Received in Open Court
at 5:10 PM Jan 8, 1981
Albert T. Byrd, Dep. Clerk

IN THE SUPERIOR COURT OF BIBB COUNTY

STATE OF GEORGIA

STATE OF GEORGIA	:	INDICTMENT NO. 21619
	:	
VS	:	MURDER
	:	
JIMMY HORTON	:	BURGLARY (2 counts)

VERDICT

We the jury find the following statutory aggravating circumstance to exist in this case:

The offense of murder was committed while the offender was engaged in the commission of burglary,

and we recommend that the defendant be punished by death.

FILED IN OFFICE
Feb 27 11 a.m. 1981
Clerk Superior Court
Deputy Clerk

C. R. Cronin
Foreman
2-27-81

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